BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

PAUL KELLY TOSH	)	
Claimant	)	
	)	
VS.	)	
	)	
MIDWEST CONCRETE MATERIALS	)	
Respondent	)	Docket No. 1,023,236
	)	
AND	)	
	)	
BUILDER'S ASSN. SELF-INS. FUND	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier request review of the April 5, 2006 Award by Administrative Law Judge Bryce D. Benedict. The Board heard oral argument on July 11, 2006.

APPEARANCES

Jeff K. Cooper of Topeka, Kansas, appeared for the claimant. Jennifer L. Arnett of Overland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge (ALJ) awarded claimant a 7.5 percent functional impairment as well as a 28 percent work disability based upon a 42 percent task loss and a 14 percent wage loss.

The respondent requests review of the nature and extent of disability. Respondent argues claimant failed to meet his burden of proof to establish he suffered a work disability (a permanent partial general disability greater than the functional impairment rating) as a result of his accidental injury. Respondent argues the claimant should be limited to his functional impairment because his injuries did not result in permanent restrictions.

Respondent further argues claimant should be limited to his functional impairment because respondent offered claimant employment at the same wage he was earning at the time of his injury and claimant never responded to the offer. The respondent requests the Board to modify the ALJ's Award and limit claimant's compensation to an award of a 7.5 percent functional impairment.

Claimant requests the Board to affirm the ALJ's determination that he met his burden of proof to establish that he is entitled to compensation for a work disability. But claimant argues that he is entitled to a 50.75 percent work disability based upon an 87.5 percent task loss and a 14 percent wage loss.

The only issue before the Board on this request for review is the nature and extent of claimant's injuries and disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties contained in the regular hearing, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The Board finds the ALJ's findings and conclusions are accurate and supported by the law and the facts contained in the record. It is not necessary to repeat those findings and conclusions in this Order. The Board approves those findings and conclusions and adopts them as its own.

The claimant started working for respondent as a ready-mix concrete truck driver. On March 16, 2004, claimant accepted a higher paying mechanic job with respondent that included significant overtime. The mechanic job required claimant work on his feet on a concrete floor. Claimant began to experience pain and discomfort in his feet. Respondent referred claimant to Dr. James D. Gardner who examined claimant on July 29, 2004 and diagnosed him with bilateral plantar fasciitis. The doctor recommended claimant return to his truck driving job in order to reduce the trauma of standing on a concrete surface.

As a result of Dr. Gardner's recommendations the respondent returned claimant to a truck driving job but the pay was less than his former pay as a mechanic.[1] Claimant continued to experience bilateral foot pain and he was referred to Dr. James R. McAtee, an orthopedic surgeon. Dr. McAtee first examined claimant on January 26, 2005, and claimant was primarily complaining of left heel problems. The doctor acknowledged claimant had previously had bilateral foot complaints. During his treatment with Dr. McAtee claimant received a cortisone injection, extracorporeal shockwave therapy, ultrasound,

[1] The parties stipulated that claimant's average weekly wage on the July 29, 2004 accident date was $675.33. After he was placed back in the truck driving job on July 29, 2004 his wage decreased to $574.52.

splinting and custom orthotics. On May 20, 2005, Dr. McAtee restricted claimant to driving an automatic transmission truck but claimant was not provided such a truck and the restriction was lifted on June 13, 2005 as the doctor returned claimant to full-duty work without restrictions. But Dr. McAtee agreed it was appropriate for Dr. Gardner to have recommended claimant leave the mechanics job for truck driving and he recommended claimant enter a vocational retraining program to find employment that would not irritate his bilateral plantar fasciitis.

Approximately, July 23, 2005, claimant quit his job with respondent and moved to the Kansas City area to attend a trade school. In February 2006, respondent offered to re-employ claimant as a mechanic at $12 per hour with the same hours as he had worked when he was a mechanic for respondent. The claimant never responded to the offer.

On September 2, 2005 the claimant was examined by Dr. Stanley A. Bowling, at the request of respondent's insurance carrier. Claimant complained of bilateral foot pain and the doctor diagnosed bilateral plantar fasciitis. The doctor related claimant's condition to the fact that he worked on concrete floors while a mechanic for respondent. The doctor concluded claimant had a 3 percent whole person functional impairment. The doctor did not impose any work restrictions and after review of a task list prepared by Monty Longacre, a vocational rehabilitation counselor, concluded claimant did not have any task loss. But the doctor agreed that if claimant were to stand on concrete for eight hours or more it would make claimant's bilateral chronic plantar fasciitis more symptomatic. The doctor testified:

> Q. Okay. We can't talk about what's possible. Given this gentleman's condition, if he were to stand for eight or more hours per day, and I think there is some evidence that he worked at times considerable amounts of overtime, most of that time on concrete, most of that time standing, in your opinion, within a reasonable degree of medical probability, Doctor, would that more probably true than not make Mr. Tosh's bilateral chronic plantar fasciitis more symptomatic?
>
> A. Correct, yes.[2]

On June 14, 2005, the claimant was examined by Dr. Sergio Delgado at the request of claimant's attorney. The doctor made treatment recommendations and suggested restrictions of limited driving activities and noted claimant should avoid prolonged standing, walking, climbing stairs and kneeling. Some months later after reviewing additional reports and medical records regarding claimant's condition the doctor opined claimant suffered a 12 percent whole person functional impairment and concluded his previous restrictions were now permanent. Dr. Delgado reviewed the task list prepared by Mr. Longacre and concluded claimant had lost the ability to perform 28 of 32 tasks.

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[2] Bowling Depo. at 14-15.

Respondent notes that claimant was released without restrictions by Dr. McAtee and that Dr. Bowling also concluded claimant did not need restrictions. Respondent argues that since claimant had no restrictions he could still perform his job as a mechanic and it was bad faith for him to refuse to respond to the offered re-employment. Accordingly, the respondent further argues claimant is limited to his functional impairment.

An injured employee is barred from a work disability under K.S.A. 44-510e(a) if he or she is earning 90 percent or more of the employee's pre-injury wage. It is well settled that an injured employee must make a good faith effort to return to work within their capabilities in order to be entitled to work disability under K.S.A. 44-510e(a).[3] Additionally, permanent partial general disability benefits are limited to the functional impairment rating when the worker refuses to attempt or voluntarily terminates a job that the worker is capable of performing that pays at least 90 percent of the pre-accident wage.[4]

Likewise, employers are encouraged to accommodate an injured worker's medical restrictions. In so doing, employers must also act in good faith.[5] In providing accommodated employment to a worker, *Foulk*[6] is not applicable where the accommodated job is not genuine[7] or not within the worker's medical restrictions,[8] or where the worker is fired after attempting to work within the medical restrictions and experiences increased symptoms.[9] Even returning to one's regular job will not preclude a work disability where the job is only temporary and not offered in good faith.[10]

Initially, it should be noted that respondent's argument that claimant did not have restrictions overlooks Dr. Delgado's testimony that claimant should avoid prolonged standing which he defined as two-thirds of an eight-hour period. The doctor further noted if claimant was required to stand over a period of eight hours he should be able to change positions or sit. Because the mechanic job for respondent required claimant to stand on

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[3] *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 889 (1999).

[4] *Cooper v. Mid-America Dairymen*, 25 Kan. App. 2d 78, 957 P.2d 1120, *rev. denied* 265 Kan. 884 (1998).

[5] *Niesz v. Bill's Dollar Stores*, 26 Kan. App. 2d 737, 993 P.2d 1246 (1999).

[6] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140, *rev. denied* 257 Kan. 1091 (1995).

[7] *Tharp v. Eaton Corp.*, 23 Kan. App. 2d 895, 940 P.2d 66 (1997).

[8] *Bohanan v. U.S.D. No. 260*, 24 Kan. App. 2d 362, 947 P.2d 440 (1997).

[9] *Guerrero v. Dold Foods, Inc.*, 22 Kan. App. 2d 53, 913 P.2d 612 (1995).

[10] *Edwards v. Klein Tools Inc.*, 25 Kan. App. 2d 879, 974 P.2d 609 (1999), and *Gadberry v. R.L. Polk & Co.*, 25 Kan. App. 2d 800, 975 P.2d 807 (1998).

concrete for a minimum of eight hours, it could not be performed within Dr. Delgado's restrictions. The initial treating physician restricted claimant from standing on concrete and Dr. McAtee agreed that was an appropriate restriction. Moreover, Dr. Bowling agreed that if claimant went back to his mechanic job standing on concrete he would probably suffer an increase in his bilateral plantar fasciitis symptoms. The Board concludes the offered mechanic position was not within Dr. Delgado's restrictions and even Dr. Bowling agreed that if claimant returned to that job it was probable he would become more symptomatic.

The ALJ analyzed the proposed job offer in the following pertinent part:

> There is reason to question whether the Claimant would have been successful in becoming so re-employed. Dr. McAtee testified that when he released the Claimant to full duty he did this to allow the Claimant to return to work to "see how he did." Dr. Bowling testified that if the Claimant returns to his prior duties this will not result in further injury, but it probably would increase the Claimant's pain. For the Claimant to take up the Respondent on its offer would require the Claimant to quit school, move to Manhattan, and face the possibility that the job would make his feet so painful he would have to quit again. Even Mr. Sanson, the human resources manager for the Respondent, was cognizant of such risks. He wrote that after the July 2004 visit with Dr. Gardner the respondent did not return the claimant to mechanic duties because "we did not want to put him in a situation that could cause more problems." Given this, the Court cannot find the Claimant showed bad faith in not accepting the offer.[11]

The rationale of *Foulk,* does not apply because claimant was justified in declining employment that was beyond his stated restrictions imposed by Dr. Delgado and, as agreed to by Dr. Bowling, would increase his symptomatology. Moreover, the offer of re-employment was made approximately six months after claimant quit work and had left the Manhattan area and relocated to Kansas City.[12]

The Board finds no persuasive reason to modify the ALJ's determination of claimant's functional impairment as well as his work disability and affirms the ALJ's Award in all respects.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Bryce D. Benedict dated April 5, 2006, is affirmed.

IT IS SO ORDERED.

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[11] ALJ Award (Apr. 5, 2006) at 3.

[12] See *Ford v. Landoll Corp*., 28 Kan. App. 2d 1,11 P.3d 59 (2000); *Edwards v. Klein Tools, Inc*., 25 Kan. App. 2d 879, 974 P.2d 609 (1999).

Dated this _____ day of August 2006.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant
Jennifer L. Arnett, Attorney for Respondent and its Insurance Carrier